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CURRENT DEVELOPMENTS

Status: "It's complicated"

On African leaders' troubled relationship with international courts

THERESA REINOLD — 6 September, 2017

Courts are to many African leaders what models are to soccer stars: they are arm candy, but they are not expected to develop a life of their own, or make anybody look bad in public. Thus, if international courts dare to touch upon issues that actually matter to African elites, they will either be killed off or neutered, or, if this is not possible, states will withdraw from their jurisdiction. At least this is what recent episodes seem to suggest – witness the threatened African mass exodus from the International Criminal Court (ICC), the disbanding of the Tribunal of the Southern African Development Community (SADC), or Rwanda's withdrawal

from the protocol allowing for individual access to the African Court of Human and Peoples’ Rights (ACHPR).

Yet the picture is actually more complex than that. While the relationship between African leaders and international courts is marred by misunderstandings and mutual recriminations, these struggles are a natural part of the contested process of anchoring the rule of law in Africa, and do not signal the irreversible return to the bad old times of impunity. While it is often the violations of the law that make headlines – after all, bad news is good news, and good news is no news at all – in this post I will focus on those episodes involving African leaders and international courts that give reason for cautious optimism, in order to correct the overwhelmingly negative picture that prevails in current discourses.

Exhibit A: The threatened African mass withdrawal from the ICC

At its summit in January, the African Union shocked the world by recommending an African mass withdrawal from the ICC. Yet despite the shrill rhetoric, a closer reading of the positions of African states reveals that there is more smoke than fire, and that the ICC continues to enjoy broad support in Africa. Only a handful of governments are serious about ditching the ICC, including two of the continent’s heavyweights – South Africa and Kenya. Yet in neither country withdrawal enjoys broad societal support. What is more, South Africa’s withdrawal campaign suffered a significant setback when the Gauteng High Court ruled the move unconstitutional, forcing Pretoria to revoke its withdrawal. Kenya has threatened to leave the ICC for quite some time now but has not taken concrete steps to

effectuate the withdrawal. Of the two other states that have announced their intentions to withdraw – Burundi and Namibia – the former is not necessarily a country known for its adherence to the rule of law. The withdrawal will probably be more damaging to the Burundian regime’s reputation than to the ICC’s legitimacy. Namibia’s withdrawal would be regrettable, but will probably have no impact on the administration of international criminal justice, as Namibia is unlikely to commit mass slaughter against its own citizens. Apart from these countries, the overwhelming majority of African members remain committed to the Court.

Exhibit B: The Open Bureau Meeting on Africa and the ICC

This commitment was also reflected in the constructive atmosphere at the open bureau meeting organized by the ICC Assembly of States Parties (ASP) on the relationship between Africa and the ICC. In his statement, ASP President Kaba from Senegal appealed to states parties to stick together as a family. Those present raved about the atmosphere, which fuelled hopes that a real dialogue was possible, based on mutual respect and the desire to find a constructive solution. The change of tone at the debate was widely considered to be groundbreaking and a clear departure from previous ASP debates, which had been increasingly polarized.

Exhibit C: The Habré trial

In 2016, a special chamber in the Senegalese court system found former Chadian dictator Hissène Habré guilty of grave human rights abuses and sentenced him to life in prison. It was the first-ever trial at which a domestic court of one

country found another country’s former leader guilty of grave human rights abuses. The trial has in turn prompted Chad to step up its own efforts at investigating abuses committed by Habré’s inner circle. The Habré case should therefore be welcomed as an important contribution to the rule of law, and as an indicator of African elites’ willingness – at least under certain circumstances – to go after one of their own. While the perseverance of the victims and their advocates was critical to securing Habré’s conviction, the AU’s intervention was another important factor, as the AU clearly perceived the benefits of having an African “success story” of bringing a former tyrant to justice locally.

Exhibit D: The performance of sub-regional courts

Various courts with jurisdiction over human rights are active at the sub-regional level in Africa. While the SADC Tribunal was killed off as soon as it ruled against Zimbabwe on a contentious land tenure issue, the Court of Justice of the Economic Community of West African States (ECOWAS) can be considered a success story. Among the first human rights cases heard by the Court was a complaint filed by the Media Foundation for West Africa on behalf of a journalist who had allegedly been tortured in the Gambia. Despite threats by the Gambian government, judges ultimately found the Gambia guilty – a clear signal that the Court was not going to be intimidated. Thus, while the SADC Tribunal was killed off as soon as it went against member-states’ vital interests, the ECOWAS Court survived backlashes and flourishes to this day. Finally, the EACJ has also turned out to be a solid human rights court, despite backlashes from powerful member-states, for instance when ruling against Kenya in the contentious Nyong’o case. In this case, the applicant

successfully challenged the Kenyan government’s mode of selecting delegates to the East African Legislative Assembly.

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